

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**UNITED STATES POSTAL SERVICE,**

**and**

**Case 14–CA–195011**

**ROY YOUNG, an Individual,**

*Rotimi Solanke, Esq.,*  
for the General Counsel.  
*Roderick Eves, Esq.,*  
for the Respondent.

**SUPPLEMENTAL DECISION**

**STATEMENT OF THE CASE**

MELISSA M. OLIVERO, Administrative Law Judge. On September 25, 2018, I issued a decision in which I found that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by directing employees to limit their e-mail communications to supervisors and managers and not to copy or forward e-mails to other employees or their union representatives, and Section 8(a)(3) and (1) of the Act by issuing a notice of suspension to the Charging Party for not following this directive. Citing *Purple Communications, Inc.*, 361 NLRB 1050 (2014), among other authority, I concluded that the Charging Party engaged in a protracted course of protected, concerted activity via e-mail. Subsequently, the Board overruled *Purple Communications* and announced a new standard that applied retroactively to all pending cases in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143, slip op. at 8–9 (2019). In *Caesars Entertainment*, the Board held that “an employer does not violate the Act by restricting the non-business use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.” 368 NLRB No. 143 slip op. at 8. In their briefs to the Board, the General Counsel, and Respondent requested that the case be remanded and on April 3, 2020, the Board remanded this case to me for further consideration.

On April 7, 2020, I issued an Order on Remand, offering the parties an opportunity to file a motion seeking to reopen the record and conduct a supplemental hearing. No party moved to reopen the record or for a supplemental hearing. On April 27, 2020, I issued a second order, allowing the parties time to file briefs. The General Counsel and Respondent both timely filed briefs and Respondent subsequently filed a notice of recent authority on June 20, 2020.

The following supplemental decision incorporates and supplements the findings and conclusions contained in my initial decision. Upon my review of the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties

both at the conclusion of the hearing and in response to my remand order, and the supplemental authority cited by Respondent, I make the following findings of fact and conclusions of law.<sup>1</sup>

## FACTS

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### *A. Respondent's Operations and National Support Technicians*

Respondent operates a Maintenance Technical Support Center (MTSC) in Norman, Oklahoma. (Tr. 188.) The MTSC is a single, virtual installation, which operates 24 hours a day, 7 days a week. (Tr. 34, 286.) It provides service to over 280 postal facilities with their maintenance programs and provides phone support, project support, and onsite support. (Tr. 321.) Respondent employs about 100 national support technicians (NSTs) assigned to the MTSC. NSTs are scattered throughout the United States in about 76 locations and in 6 different time zones. (Tr. 194–195, 324–325.) NSTs take rest and lunch breaks at different times (this is left to their discretion). (Tr. 195–196.) Managers and other NSTs are generally not aware of when an NST is working or on a break. (Tr. 150, 196, 198.)

NSTs have offices, desks, chairs, computers, smartphones, and access to the internet at their domiciled facilities. (Tr. 235–236, 325.) NSTs receive service calls routed through a virtual workspace called ServiceNow or from the Help Desk. (Tr. 325.) When an NST receives a work assignment, sometimes called a log or ticket, he or she calls the postal facility experiencing technical difficulties and works with maintenance employees at the affected site to diagnose and resolve the problem. (Tr. 325–326.) ServiceNow creates a log for the service call, which is viewable by any technician or manager. (R. Exh. 3; Tr. 86–87.) There is no set amount of time that an NST should spend on a call. (Tr. 249.)

NSTs communicate with each other and with their managers via e-mail, text messages, or via telephone. (Tr. 327.) However, e-mail is the primary mode of communication between NSTs and their managers. (Tr. 198.) E-mails sent to “MTSC-DL-National Support Technicians” (MTSC distribution list) are received by all MTSC employees, including all NSTs, supervisors, and managers. (Tr. 56, 208.)

Charging Party Roy Young has been an employee of Respondent for over 34 years. (Tr. 22.) Young is a NST and a member of a bargaining unit of employees represented by the Union. (Tr. 22–23, 36.) He is the only NST domiciled at the main Post Office in St. Louis, Missouri. (Tr. 23–24.)

### *B. E-mail Exchange Regarding Young's Leave Request, Including E-mails of January 9 and 10*

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In December 2016, and January 2017, Young participated in an e-mail exchange with certain managers at the MTSC regarding his request for leave. (GC Exhs. 10, 31; Tr. 73-75.) Young

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<sup>1</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions herein are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, and evidence presented at trial, as well as logical inferences drawn therefrom.

listed the reason for his leave request as a “family emergency.” (GC Exh. 31.) During this exchange, Fauchier advised Young that he would be placed on leave without pay until “documentation” was provided.<sup>2</sup> (GC Exh. 10.)

5 On December 29, 2016, Young sent an e-mail to Fauchier and the entire MTSC distribution list stating, “For your reference this annual is scheduled in advance and approve[d] therefore is not emergency request. Your request for documentation is inconsistent with Postal Policy.” (GC Exh. 10, p. 4.)

10 Later, on January 9,<sup>3</sup> Henegar sent an e-mail reminding Young that Fauchier had previously requested documentation in support of his leave request and further advising Young, “Any response to this e-mail should be restricted to Dan and me.” (GC Exh. 10, p. 3; Tr. 78.) Young copied his January 10 response to Henegar to the MTSC distribution list and several union officials. (GC Exh. 10, p. 2–3.) Young believed that his previous participation on a local  
15 collective-bargaining team was causing Respondent to harass him. (GC Exh. 10, p. 2.)

Henegar responded to Young’s e-mail on January 10, assuring him that his participation in union negotiations had nothing to do with the leave issue. (GC Exh. 10, p.1; Tr. 82–83.) Henegar also advised Young to limit his response, as follows

20 First, I have asked you to restrict your e-mail to Dan and me. Specifically, you are afforded grievance rights under Article 15 of the National Agreement should you disagree with the directive. You are not empowered with the right to the equivalent of screaming on the work room floor. Please ensure that you are using  
25 the appropriate channels.

(GC Exh. 10, p. 1; Tr. 79.)

30 Young responded to Henegar, again copying the MTSC distribution list and several union officials, on January 10, stating

I have no private or confidential information concerning my employment with the U.S. Postal Service, when wages, benefits or working conditions are topic[s] of discussion.

35 Further when it is determined that I’m dealing with persons ok with lying I prefer that all conversations be public so there is no misunderstanding.

40 If you have something you don’t want public don’t send it to me.

(GC Exh. 10, p. 1.)

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<sup>2</sup> Fauchier testified that Young was requesting emergency leave, which requires supporting documentation. (Tr. 303.) Fauchier testified that schedules are posted on Wednesdays and that leave requested after Wednesday of a particular week, is not considered a request for scheduled leave. (Tr. 304.) Henegar, however, testified that Young’s request was denied because Respondent was not granting leave in December. (Tr. 261.)

<sup>3</sup> All dates *infra* are in 2017, unless otherwise noted.

Young copied the other NSTs on his replies to Henegar because he wanted to alert them that, in his opinion, Respondent was trying to change the requirements for employees taking leave. (Tr. 80.) He also wanted to make the Union aware that Respondent was denying him leave or requiring him to submit documentation for his leave, which Young did not believe was allowable under the contract. (Tr. 80–81.) Young further believed that Henegar and Fauchier were going to retaliate against him with discipline.<sup>4</sup> (Tr. 81.)

### C. *E-mail Exchange Regarding Training Opportunity*

On January 25, Young and the other NSTs received an e-mail from Fauchier seeking applicants for an upcoming training on a piece of equipment (TMS).<sup>5</sup> (GC Exh. 6, p. 3; Tr. 59, 183.) Fauchier’s e-mail indicated that priority would be given to applicants who had this equipment within 50 miles of their domiciled site. (GC Exhs. 6, 7; Tr. 153, 183.) The referenced equipment was not located within 50 miles of St. Louis. (Id.) Young volunteered for this training on January 26. (GC Exh. 6, p. 3.) Young’s response copied numerous union officials. Young believed he should have received the training because he frequently works on equipment that is not near his domiciled site. (Tr. 183.)

Young sent another e-mail to Fauchier, copying several union officials, on February 23. (GC Exh. 6, p. 3.) Young asked for the names of the technicians selected for the training. (Id.) After receiving no response, Young e-mailed several union officials about the training opportunity. Young believed that the MTSC discriminated against certain employees by denying them training, which then caused the employees to be ineligible for assignments due to a lack of training. (GC Exh. 6, p. 2.)

Clearly frustrated, Young sent an e-mail to the entire MTSC distribution list stating, “I still haven’t heard who volunteered, who was selected, system not transparent to all.” (GC Exh. 6, p. 1.) Young’s e-mails were all sent during work time. (Tr. 68.) Another NST, Joseph Jeske, responded to Young that he had not heard either and that he [Jeske] believed this was an “ongoing problem.” (GC Exh. 6.)

NST Mike Tretick also responded to Young’s e-mail. (GC Exh. 7, p. 3.) Tretick did not believe that seniority should dictate who receives training. (Id.) Another NST agreed with Tretick, but also stated that he “wish[ed] others would make their opinions known on this matter, because it is intrinsic to the job we do.” (GC Exh. 7, p. 2.) NST Maynard Yoder joined in Tretick’s opinion. (Id.) Jeske responded to the group, indicating that seniority and common sense should dictate training assignments. (Id.) NST Rick Clary joined the discussion in support of Young, noting that Young was, “defending the current contract” and his view was “shared by many.” (GC Exh. 7, p. 1.)

<sup>4</sup> In its brief following the hearing in this case, Respondent conceded that Young was engaged in protected, concerted activity in copying his e-mails of January 10 to the MTSC distribution list and union officials.

<sup>5</sup> Nothing in this exchange of e-mails is alleged as an unfair labor practice. However, the General Counsel maintained that this exchange highlights that Young was engaged in a lengthy course of protected, concerted activity via e-mail.

*D. E-mail Exchange of February 8 Regarding Service Log (South Jersey)*

On February 8, Young received a work assignment for a piece of equipment at a New Jersey facility (South Jersey site or facility). (GC Exh. 21.) During the course of his conversation with the supervisor at the South Jersey site, Young realized that there was an NST at the site. (Tr. 88.) Young advised the supervisor to consult with the NST who was there. (Tr. 88.) Young estimated that he spent 30 minutes on the call assisting the supervisor at the site before advising him to consult with the NST who was there. (Tr. 89.)

On that same date, Henegar viewed a ServiceNow log regarding this maintenance issue.<sup>6</sup> (GC Exh. 21.) Henegar then sent an e-mail to Young questioning his approach to the call.<sup>7</sup> (GC Exh. 21; Tr. 85–87.) Henegar was not aware that there was an NST at the South Jersey facility, as his e-mail asked, “Were you requesting another NST to come and diagnose this issue?” (GC Exh. 21.) Henegar asked Young why he advised the facility to request onsite assistance after only 25 minutes. (GC Exh. 21.)

Young replied to Henegar, copying the MTSC distribution list and several union officials, stating

If you would examine this log, you would see it was opened yesterday. I made suggestion yesterday configuration, adjustments, examine for scale binding etc. Site has exhausted all suggest[ions and] ask[ed] what [would] be next[.] They informed me they had a NST at their site which [may be] trained[.] I suggested he look at system. Rather than delay the mail or lose revenue due to scale problems I told them onsite was an option. Is there a problem[?]

(GC Exh. 21, p. 2; Tr. 92–93.)

Young testified that he copied the distribution list and union officials because he was fearful of discipline and because he feared that Henegar was trying to “dig at something in order to accuse [him] of something.” (Tr. 94.)

Henegar replied to Young, stating

Again, my individual questions to you do not need to be broadcast to the entire network. This was a technical question to understand the diagnostic logic. It was not directed at the other men and women in the network and it is not a prudent use of their time to be included on a question to you. Please refrain from this activity during your working hours that is not directly related to supporting a log.

(GC Exh. 21, p. 1–2.)

<sup>6</sup> Watts did not remember if he spoke to Henegar about Young and the February 8 incident. (Tr. 382.) However, Watts and Henegar were added to watch list for Young’s log, meaning they would have received an e-mail anytime the log was updated. (R. Exh. 8; Tr. 383.) It seems highly unlikely that Watts and Henegar did not speak about this incident.

<sup>7</sup> Young conceded that managers in the MTSC have the right to ask the NSTs questions about their work and that the NSTs need to answer those questions. (Tr. 151.)

Henegar believed that Young's response to the entire network was not an efficient use of everyone's time, as his concern was specific to one ticket handled by Young. (Tr. 204.) Henegar testified that he was not trying to abridge Young's ability to confer with the Union or file a grievance.<sup>8</sup> (Tr. 279.)

Young initially responded only to Henegar after Henegar requested that Young not broadcast his response to the entire network. (GC Exh. 21, p. 1; Tr. 208.) Later, Young sent the same response to Henegar, which he copied to the MTSC distribution list and certain union officials. (R. Exh. 2; Tr. 208.) Young's responses stated

In light of the harassment intimidated [sic] and threats receive [sic] from MTSC I fell [sic] it is only prudent to have our conversations in a public forum. You are making for a very hostile work environment with these threats if this was a technical question as you stated it could only benefit the whole network as to proper procedures[.]

(R. Exh. 2.) Young believed that Henegar was trying to harass him and hoped other employees would support him. (Tr. 96.) Despite the subject of the e-mail being Young's diagnostic logic, Young could have been subject to discipline if he had handled the incident incorrectly. (Tr. 96.)

Henegar responded to Young indicating, "There is no harassment here. Just trying to understand how we are advising the field. Your explanation was satisfactory and appreciated." (GC Exh. 21, p. 1.)

Young received an e-mail from Jeske on March 9. (GC Exh. 6; Tr. 97.) This e-mail was not in direct response to the e-mails listed above. (GC Exh. 21; R. Exh. 3.) Jeske advised Young that he agreed with his diagnostic assessment and supported him in his procedure. (GC Exh. 6; Tr. 97–98.) Jeske further stated that Henegar was harassing Young and trying to discredit him.<sup>9</sup> (GC Exh. 6, p. 1.)

#### *E. E-mail Exchange of February 10 Regarding Service Log (Lincoln)*

On February 10, Brian Watts initiated an e-mail exchange regarding a flat sorter machine in Lincoln, Nebraska, serviced by Young. (GC Exh. 11; Tr. 99–100.) Watts' e-mail, copied to Henegar, attached the ServiceNow log for the incident. After trying to assist an employee at the site with the problem for about 35 minutes, Young decided to escalate the incident to a subject

<sup>8</sup> This testimony is pointedly contradicted by the transcript of Young's pre-disciplinary interview (PDI), in the record as GC Exh. 16, and notice of suspension, in the record as GC Exh. 14, both of which mention Young's e-mailing union officials as part of the reason for his discipline.

<sup>9</sup> Respondent objects to my admission of GC Exh. 6 into the record, asserting that the document was not properly authenticated and constitutes hearsay. I believe that this e-mail is admissible to show the effect it had on Young and to show that Young did receive a response to his e-mail solicitations to his coworkers. In any event, even if I did not admit GC Exh. 6, there is ample evidence supporting my finding that Young was engaged in protected, concerted and union activity when he sent his e-mails to the MTSC distribution list and certain union officials.

matter expert (SME). (Tr. 102–103.) Watts asked Young to clarify his thought process for escalating the incident to a SME, stating

5 Roy please clarify your thought process for escalating this to [an] SME, [it is] very important that the NST's [sic] exhaust every avenue for resolution at their level? [sic]

Maybe I am missing something but would like to understand your decision making on this, thanks.

10 (GC Exh. 11, p. 2.)

In his reply, Young copied the MTSC distribution list and some union officials. Young copied the others because he felt he was being harassed and because he was trying to create a record in the event he received discipline. (Tr. 105.) Young stated

20 Am I the only one being harassed by these e-mails you and Mr. Henegar keep sending me? I'm sure if you had some technical experience you would understand these matter[s] but to educate you [sic]. When I make a professional assessment with my more than 40 years of training and experience in order to provide the site with the assistance needed I make the appropriate call in my opinion, [sic] If you have other thoughts on how better to serve the site please share.

25 (GC Exh. 11, p. 2.)

Watts felt Young's response was inappropriate, characterizing it as both flippant and dismissive. (Tr. 335–336.) Watts also felt that copying the MTSC distribution list was inappropriate. (Tr. 336.)

30 Watts responded to Young, copying Henegar, stating

35 Roy just trying to understand why after working with the site for 35 minutes you chose to escalate the problem to a SME with no way of knowing if the cable replacement fixed the problem.

40 So you know Erich and I communicate with other NSTs on a variety of issues to accomplish MTSC's goal of supporting the field in an efficient manner. No need to write me back on this topic as you have been previously instructed on several occasions, when corresponding with management it's not necessary to copy the entire network. Thanks and please focus your efforts on resolving tickets in an efficient manner to support the network.

45 (GC Exh. 11, p. 1.)

Young responded, again copying the MTSC distribution list and some union officials, as follows

As stated before if we are discussing postal issues I had no secrets and you know I feel MTSC has not been very truthful on numerous occasions so I prefer all conversations be in [an] open forum. To assist you in understanding my duties I would refer you to [Management Instruction AS-530-1999-5 regarding the responsibilities of NSTs].

(GC Exh. 11, p. 1.)

Watts described Young's e-mails to other NSTs as, "divisive." (Tr. 356–357.) Watts believed his e-mail conversation with Young on February 10 should have remained private. (Tr. 359.)

#### *F. Pre-Disciplinary Interview*

A pre-disciplinary interview (PDI) was held on February 17, 2017, with Henegar, Young, and Young's union steward, David Rubino. (GC Exh. 16; Tr. 214.) During the PDI, Young was asked to explain his continued copying of the entire network despite instructions to stop doing so. (GC Exh. 16.) Young responded by referring the interviewer to his e-mail exchanges with Henegar and Watts. (Id.) Young's copying of his e-mails to other employees and union officials was mentioned by Henegar throughout the PDI.

Before issuing the notice of suspension, Henegar conferred with a higher-level manager. (GC Exh. 26; Tr. 265–266, 268.) Henegar believed Young's responses to him were flippant and failed to answer the questions posed.<sup>10</sup> (Tr. 266.)

#### *G. E-mail Exchange Initiated March 7 Regarding REAL ID*

On March 7, Fauchier sent an e-mail to the MTSC distribution list regarding the posting of a position. (GC Exh. 12, p. 8.) Later that day, NST Jimmy Martin provided a link to the posting. Martin's e-mail was sent to Fauchier and the MTSC distribution list. In response to this link, NST Gary Freeman sent an e-mail to Martin, Fauchier, and the MTSC distribution list, asking if anyone had heard about new identification requirements for air travel. (GC Exh. 7, p. 7.)

On March 8, NST Muncy Henderson sent an e-mail to Freeman, Martin, Fauchier, and the MTSC distribution list. (GC Exh. 12, p. 4.) Henderson's e-mail contained information from the Department of Homeland Security regarding states which were compliant with the REAL ID Act,<sup>11</sup> as well as lists of non-compliant states, and states which had received an extension of time

<sup>10</sup> However, Henegar also testified that Young's e-mail of February 10 answered his concerns. (Tr. 203, 255.)

<sup>11</sup> "Passed by Congress in 2005, the REAL ID Act enacted the 9/11 Commission's recommendation that the Federal Government 'set standards for the issuance of sources of identification, such as driver's licenses.' The Act established minimum security standards for state-issued driver's licenses and identification cards and prohibits Federal agencies from accepting for official purposes licenses and identification cards from states that do not meet these standards." <https://www.dhs.gov/real-id-public-faqs>.



to comply. Henderson indicated that his state's extension was running out in a few months and that he would be applying for a passport.

5 Later that day, Freeman sent an e-mail to several other employees, Fauchier, and the MTSC distribution list. (GC Exh. 12, p. 3.) Freeman asked if the MTSC would provide the NSTs with REAL ID compliant identification for use on official travel.

10 On March 9, Fauchier sent an e-mail to the MTSC distribution list regarding the REAL ID issue. (GC Exh. 12, p. 2; Tr. 108.) Fauchier advised the NSTs that individual employees would be responsible for having identification compliant with TSA requirements under the REAL ID Act. Fauchier further explained that individual employees would need to bear the cost of obtaining such identification. NST Geoffrey Stevens replied to Fauchier, copying the MTSC distribution list, disagreeing with Fauchier's position. Stevens believed that Respondent should bear the cost of employees' identification required for official travel. Two other NSTs also  
15 responded to the entire MTSC distribution list with opinions on the issue.<sup>12</sup> (GC Exh. 12, p. 1.)

20 Over the course of the next several days, an NST in Albuquerque copied the entire MTSC distribution list comparing the cost of obtaining REAL ID compliant identification to the cost of obtaining government mandated personal protective equipment (PPE) or tools. The NST wondered why Respondent would not pay for REAL ID compliance. Another NST replies to the Albuquerque NST stating, "Really? . . . I'm not trying to bust your chops on this...I'm as irritated as you are except my source of irritation is the increasing intrusiveness of government . . .". Several other responses were also sent to the entire MTSC distribution list.

25 On March 13, Fauchier sent a final e-mail to the MTSC distribution list regarding the REAL ID issue. (GC Exh. 12, p. 1.) Fauchier believed that continued conversation would take away from employees' performance of their official duties. (Tr. 294.) The question had been answered and Fauchier felt the conversation needed to stop. (Tr. 295.) Fauchier advised employees, "The cost of required ID for travel is on the traveler due to the fact that the same ID  
30 can be used for personal use as well. END OF SUBJECT please! If you have additional concerns/comments on this subject, direct them to me ONLY." (Emphasis in original) (Id.)

#### *H. Issuance of Notice of Suspension to Young*

35 On March 14, Henegar issued Young a "Notice of Fourteen (14) Day Suspension" (notice of suspension). (GC Exh. 14; Tr. 119–120.) The basis for the notice of suspension was unsatisfactory conduct for incidents occurring on February 8 and 10. (Tr. 120.)

40 Specifically, the notice of suspension states

Charge: Unsatisfactory Conduct—Failure to Follow Instructions

On February 8, 2017, I sent you an inquiry regarding your activity in a HelpDesk log for South Jersey PDC. Your response to my question was dismissive and

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<sup>12</sup> Respondent, in its brief following the hearing, conceded that the employees were engaged in protected, concerted activity in the course of the e-mails regarding the REAL ID issue.

failed to answer the question I posed. You were directed by me that the e-mail was a private inquiry in nature and that you have been advised that e-mailing the entire network with such matters was inefficient and inappropriate. . . .

5 Despite this instruction, you e-mailed the entire network (MTSC-DL-National Support Technicians) as well as several union officials, despite previous instruction to cease this behavior during productive working hours . . . This behavior is disruptive to the network, and causes other technicians to deviate from their work while reviewing e-mail traffic that is not germane to their task,  
10 productive or in regard to the overall knowledge base.

On February 10, 2017, MFSS Brian Watts sent a similar inquiry to you regarding a HelpDesk log for Lincoln PDF. Mr. Watts had a concern regarding the escalation process and inquired of you regarding your handling of the ticket.  
15 Again, you were curt in your response, and copied the entire network and several union officials. Even after being instructed by Mr. Watts that you should not respond to the entire network, you did so.

20 . . . However, you have provided no explanation regarding your repeated failure to follow direct orders that would mitigate or validate your actions.

As such, I find no excuse that would support authorization or mitigation for your failure to follow instructions.

25 . . .

Your actions are in violation of the following Employee and Labor Relations Manual (ELM) Sections:

30 665.13 Discharge of Duties . . .

665.15 Obedience to Orders . . .

35 665.16 Behavior and Personal Habits . . .

665.6 Disciplinary Action . . .

(GC Exh. 14.)

40 Young's discipline was based on Employee Labor Relations Manual (ELM) sections 665.13 (Discharge of Duties), 665.15 (Obedience to Orders), and 665.16 (Behavior and Personal Habits). (GC Exh. 14; Tr. 263, 269.) The notice of suspension was specific to the instructions Henegar and Watts gave Young not to copy his e-mails to the MTSC distribution list and union officials. (Tr. 64.) Henegar did not cite to any rules specifically mentioning use of e-mail in the  
45 notice of suspension. (Tr. 264.) Henegar testified that the MI concerning limited use of government systems, including e-mail, did not factor into his decision to issue the notice of suspension. (GC Exh. 4; Tr. 264.)

Henegar requested a 14-day suspension for Young because he failed to follow Henegar's and Watts' instructions to stop copying the network on e-mails that were not pertinent to the network. (Tr. 213.) Henegar was concerned that Young's e-mails were not an efficient use of employees' time. (Tr. 225.) Henegar believed that Young took away from other employees doing their work because they had to read his e-mails. (Tr. 258.) Henegar did not know which employees read Young's e-mails. (Tr. 259.) Henegar believed that Young failed to follow instructions and work conscientiously and effectively by e-mailing the entire network with issues not pertinent to them. (Tr. 246–247.) Henegar testified that Young's copying of the union officials was not a factor in his decision to issue the discipline.<sup>13</sup> (Tr. 216.)

Previously, Young received a letter of warning in May 2016 for working unauthorized overtime. (GC Exhs. 14, 15; Tr. 129.) Young had also previously received a 7-day suspension for unsatisfactory conduct on February 21. (GC Exh. 15; Tr. 121.) This suspension was for the leave taken by Young in December 2016, for which he was deemed absent without leave (AWOL). (GC Exh. 15; Tr. 122.) The Union filed a grievance for Young over the discipline, despite Young's request that the Union take no action. (GC Exh. 25; Tr. 122.) As part of the resolution of a national grievance, Respondent was to remove the AWOL designation, make Young whole for any leave he requested, and rescind the discipline.<sup>14</sup> (Tr. 122.)

Young filed a grievance over the notice of suspension he received in March. (GC Exh. 8, p. 2.) The grievance had not been resolved at the time of the hearing but remained in the parties' grievance-arbitration procedure. (Tr. 217.) Without resolving the grievance, Watts reduced Young's 14-day suspension to a 7-day suspension on May 17. (R. Exh. 9; Tr. 339–340.) Watts advised the Union that the suspension was downgraded because Young's previous 7-day suspension was not properly scheduled for a meeting in accordance with the parties' contract. (R. Exh. 9, p.2.)

#### *I. March 14 Instruction of Henegar to Avoid Dissemination of E-mails*

On March 14, Shawn Collins, acting duty officer, sent an e-mail to Young seeking support for a facility. (GC Exh. 13; Tr. 114.) Collins sent the work assignment via e-mail at 12:03 p.m. but Young did not see it until 12:49 p.m. (Tr. 117.) Young asked Collins to call him in the future, instead of sending an e-mail, when seeking assistance.<sup>15</sup> (GC Exh. 13; Tr. 116.) On March 15, Henegar advised Young to monitor his e-mail, phone, and VOIP for incoming service logs. In his e-mail, Henegar stated

I am responding to you by e-mail and you may respond to me directly or call me, if you prefer. This is a reiteration of my work instructions performance expectations and is not appropriate for dissemination to the network or anyone else beside you and me . . . This message is not intended to abridge any rights you

<sup>13</sup> Henegar's testimony stands in absolute contrast to the notice of suspension, which stated that Young was disciplined for, "E-mail[ing] the entire network (MTSC-DL-National Support Technicians) as well as several union officials." (GC Exh. 14.)

<sup>14</sup> The settlement regarding the leave policy for the MTSC is in the record as GC Exh. 24.

<sup>15</sup> In the course of a workday, Young estimated that he received up to 120 e-mails. (Tr. 84.)

have under the NLRA and your Article 15 rights afford you the opportunity to consult with the appropriate steward if you have any wish to file a grievance over the matter.<sup>16</sup>

5 (GC Exh. 13.) Henegar marked this e-mail as “Private.” (GC Exh. 13.) Henegar testified that he marked this e-mail private because he considers work instructions to a single employee as private. (Tr. 275–278.)

10 Young responded to Henegar, copying the MTSC distribution list and certain union officials.<sup>17</sup> (GC Exh. 13; Tr. 115.) Young said he did so to inform other NSTs of what he deemed a “change in policy.” (Tr. 119.) Young advised Henegar to review the Standard Operating Procedure (SOP) for NSTs. (GC Exh. 13.) The SOP requires NSTs to check their e-mails twice a day while on duty. (GC Exh. 3, p. 6.)

#### 15 *J. Facebook Group*

At some point, a Facebook group was established for NSTs. (GC Exh. 27.) NST Mike Tretick advised Henegar on March 17 that, “I run a Facebook group that is comprised of \*most\* of the NSTs.” (Emphasis in original.) (GC Exh. 27.) Tretick told Henegar that he formed the group to, “get the extraneous emails” off Respondent’s system. Id. Addressing Young’s e-mails, Tretick stated, “These emails [sic] strings between you and Roy that Roy broadcasts to the world are a topic of discussion in the group.” Tretick then encouraged Henegar by stating, “The general feeling is that you can do whatever you want and get away with it. You may get a threatening email but so what!” Tretick went on to state, “There are a couple that back Roy [Young] up but you can count them on one hand.”

#### *K. Evidence Regarding Use of Respondent’s E-mail System*

30 Respondent maintains Management Instruction EL-660-2009-10 (the “MI”), entitled Limited Personal Use of Government Office Equipment and Information Technology. (GC Exh. 4.) The policy contained in the MI states

35 Management at each Postal Service employment installation may permit employees to make limited personal use of Postal Service office equipment, including information technology, provided such use does not:

- Reduce or otherwise adversely affect the employee’s productivity during work hours.
- Interfere with the mission or operations of the Postal Service.

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<sup>16</sup> At the conclusion of the hearing, I allowed the General Counsel’s motion to amend the complaint to add an allegation that Respondent violated Sec. 8(a)(1) of the Act on March 15, when Henegar advised Young, “This is a reiteration of my work instructions performance expectations and is not appropriate for dissemination to the network or anyone else beside you and me.”

<sup>17</sup> Respondent, in its brief following the hearing, conceded that Young was engaged in protected, concerted activity in the course of the e-mails of March 14.

- Violate the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR 2635).

5 (GC Exh. 4.) The MI goes on to list examples of limited personal use, including, “sending a brief e-mail message.” According to the MI, limited personal use must not, “reduce employee productivity or interfere with official Postal Service business (e.g., congest, delay, or disrupt any Postal Service system or equipment).”<sup>18</sup>

10 On January 25, the same day as Fauchier’s solicitation for training volunteers discussed above (GC Exh. 6), Henegar sent an e-mail to the MTSC distribution list, reminding employees that they should stay productively engaged while at work. (R. Exh. 4; Tr. 211.) Henegar stated

15 E-mailing all employees in the network with nonwork related items, during work hours, is an inefficient use of resources. This platform was created to provide you and your peers the opportunity to share each other’s knowledge and skills to better perform your job. Please ensure that, while you are on working time, your efforts stay affixed to that goal. This is an expectation, and failure to adhere to this expectation can lead to corrective action.

20 I do not relish issuing statements like this. Please evaluate your own performance and ensure that you are working in the manner expected. If you are not sure, please discuss with us individually or with your union representative, as appropriate.

25 (GC Exh. 5; R. Exh. 4.) In response to Henegar’s e-mail, Young copied the MTSC distribution list, stating

30 If [you] would check service now you would see all NSTN logged in and ready or actively working logs. Use of e-mail is within management instructions EL-660-2009-10.

Your threats and harassment are an abuse of supervisory authority and are creating a hostile work environment.

35 You have the right to ignore conversations between NSTN if you choose.

(GC Exh. 5; R. Exh. 4.)

40 Apparently, not all other NSTs appreciated receiving Young’s e-mails. On March 24, NST Robert Levy sent an e-mail to Henegar regarding e-mails sent by Young. (R. Exh. 6.) Levy stated that over the past few months “we” have received serious spam from Young resulting in the issuance of “blanket policies.” Levy stated, “This will not be best for the future of our Team, and the Company.” Levy goes on to state that the communication highway needs to stay open, but not with spam like this. In addition, Levy stated that he gets loaded down with e-mails that

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<sup>18</sup> Henegar testified that he did not consider Respondent’s limited use policy when he decided to discipline Young in March. (Tr. 264.)

make him uncomfortable, changing his mood and becoming a safety issue. Levy goes on to state, “This is BS!”

Other NSTs have sent nonwork-related e-mails to the MTSC distribution list. On September 24, 2016, NST Louis Mazurek sent an article from the satirical publication *The Onion* to the MTSC distribution list and NST Bill Larsen responded to Mazurek and the entire MTSC distribution list. (GC Exh. 17.) The subject line of Larsen’s e-mail was “Experts Advise Against Throwing Laptop Across Office Even Though It Will Feel Incredible.” (GC Exh. 17.)

On March 15, NST Tretick sent an e-mail to over 50 NSTs which included an NBC News report that Respondent would offer early retirement to 150,000 workers. (GC Exh. 28.) Two of the NSTs replied to the entire group. (GC Exh. 28.) The final response was copied to the MTSC distribution list. (GC Exh. 28.)

On August 21 and 23, NSTs shared e-mails with the entire MTSC distribution list regarding a solar eclipse. (GC Exh. 29.) In late August and early September, NSTs shared numerous e-mails about flooding in Houston, Texas, with the entire MTSC distribution list. (GC Exh. 18.) These e-mails included jokes and photos of weather reports, a photo from the movie *Jaws*, and a photo of a ship being overtaken by a kraken.<sup>19</sup> (GC Exh. 18.) Henegar considered these e-mails inappropriate, and further testified that they were discussed internally. (Tr. 223.) Watts did not consider these e-mails inappropriate because he claimed that he was concerned for three NSTs domiciled in Houston at the time of a hurricane. (GC Exh. 18; Tr. 342–343.)

On September 11, NST Tretick sent a humorous e-mail regarding the impact of Hurricane Irma to the MTSC distribution list. (GC Exh. 19.) Henegar was not sure whether Tretick was working when he sent this e-mail. (Tr. 224.) Watts did not consider Tretick’s e-mail inappropriate because he testified that he was concerned for the welfare of six NSTs domiciled in Florida, including Tretick, at the time of Hurricane Irma. (Tr. 344.)

Also, on September 11, NST James Lynch sent a humorous e-mail regarding a whiskey-fueled car to the MTSC distribution list. (GC Exh. 20.) Lynch’s e-mail garnered numerous responses, also sent to the entire MTSC distribution list, including jokes regarding beer and the use of chainsaws. (GC Exh. 20.) Watts was also aware of this e-mail exchange, but was not concerned about it, as he claimed that the exchange showed an NST about to cut up a tree that fell in his yard during Hurricane Irma. (Tr. 345.)

Between September 15 and 17, NSTs shared e-mails with the entire MTSC distribution list regarding a group of employees styled “the Irma Road Crew.” (GC Exh. 22.) This e-mail exchange contained photos and discussion of steaks and beer served for dinner to the Road Crew. (GC Exh. 22.) Henegar testified that these e-mails were not the same tenor as Young’s e-mails; they were not the equivalent of screaming on the work room floor. (Tr. 256.) Watts was not concerned about this e-mail either. (Tr. 346.) Watts contrasted these e-mails with those of Young, which he said contained “derisive conversation.” (Tr. 346.)

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<sup>19</sup> The kraken is a legendary sea monster of gigantic size and cephalopod-like appearance in Scandinavian folklore. See <https://en.wikipedia.org/wiki/Kraken> for further information.

Henegar further admitted that MTSC employees send lots of e-mails on nonwork subjects and that he considers it a common problem. (Tr. 237–238.) He testified that employees should never send e-mails to the entire MTSC distribution list about nonwork issues because some employees might be working at the time they receive the e-mails. (Tr. 240.) Watts also testified that employees occasionally use Respondent’s e-mail system to discuss things that have nothing to do with work. (Tr. 365.)

## ANALYSIS

### A. *Alleged Unfair Labor Practices*

In paragraph 5 of the complaint, the General Counsel alleged that Respondent violated Section 8(a)(1) of the Act by: directing Young to restrict an e-mail regarding leave policies to Henegar and another manager on January 9; directing Young to restrict an e-mail message pertaining to application of leave policies to Henegar and another manager on January 10; directing Young to refrain from copying other employees on an e-mail to management pertaining to conditions of employment on February 8; directing Young to refrain from copying other employees on e-mails to management pertaining to conditions of employment on February 10; and directing employees to cease discussing costs of identification cards for official travel and to direct any concerns or comments to Fauchier only on March 13. At trial, the General Counsel moved to amend the complaint to add an allegation that Respondent violated Section 8(a)(1) of the Act on March 15, when Henegar advised Young, “This is a reiteration of my work instructions performance expectations and is not appropriate for dissemination to the network or anyone else beside you and me.” I allowed the amendment. The General Counsel further alleged, in paragraph 6 of the complaint, that Respondent violated Section 8(a)(3) and (1) of the Act by issuing Young a Notice of Fourteen (14) Day Suspension on March 14.

In its answer, Respondent denied that it violated the Act. In its post-hearing brief, Respondent conceded that Young and/or other employees were engaged in protected, concerted activity relative to the e-mails of January 9 and 10, March 13, and March 14. Respondent denied that Young was engaged in protected, concerted activity with regard to the e-mail exchanges of February 8 and February 10. I found in my earlier decision that Young was engaged in protected, concerted, and union activity when he sent his e-mails of January 9 and 10, February 8 and 10, and March 13 and 14 to the entire MTSC distribution list. I find no reason in the record to disturb my findings. Furthermore, I find that the credibility resolutions made in my prior decision are valid, supported by the record, and are hereby incorporated by reference into this supplemental decision.<sup>20</sup>

As indicated above, on remand, the Board has ordered me to reconsider my findings in light of its decision in *Caesars Entertainment*, 368 NLRB No. 143 (2019). After considering my decision in light of *Caesars Entertainment*, I still find that Respondent violated the Act as alleged.

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<sup>20</sup> Further inconsistencies between the testimony of certain of Respondent’s witnesses, and between Respondent’s witnesses and the documentary evidence in the record, are noted above.

B. *Discussion of the Board’s Jurisprudence Regarding Employees’ Use of Their Employers’ E-Mail Systems to Engage in Protected, Concerted Activity*

In *Purple Communications*, 361 NLRB 1050 (2014), the Board recognized that the rights of employees to communicate at their jobsite is the foundation for the exercise of their Section 7 rights under the Act.<sup>21</sup> 361 NLRB at 1054 (*Purple Communications I*). The Board then recognized that e-mail has become a critical means of communication, about both work-related and other issues, in a wide range of employment settings. 361 NLRB at 1055–1056. The Board further pointed out the use of an employer’s e-mail system is not analogous to employee use of other business equipment, such as a bulletin board or telephone.<sup>22</sup> 361 NLRB at 1057. Unlike such limited and finite resources, e-mail systems allow for multiple, simultaneous, and interactive exchanges. 361 NLRB at 1057. The Board found that an employer’s e-mail system is a forum for communication, substantially different from any sort of property that the Board had previously considered. 361 NLRB at 1061. The Board, balancing the conflicting rights of employers and employees, concluded that e-mail has become a forum in which employees can seek to persuade fellow workers in matters related to their status as employees. 361 NLRB at 1061, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978). Thus, the Board held that it would presume that employees who have rightful access to their employer’s e-mail system in the course of their work, have a right to use the e-mail system to engage in Section 7-protected communications on nonworking time.<sup>23</sup> 361 NLRB at 1063.

In 2019, the Board overturned *Purple Communications* and announced a new standard for determining the lawfulness of an employee’s use of his or her employer’s e-mail system to engage in protected, concerted activity. *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 368 NLRB No. 143 (2019). In *Caesars Entertainment*, the Board stated that “decades of Board precedent establish that the Act generally does not restrict an employer’s right to control the use of its equipment.” 368 NLRB No. 143, slip op. at 1, citing *Register Guard*, 351 NLRB at 1114–1115. In *Caesars Entertainment*, the employer maintained a policy regarding the use of its computers. 368 NLRB No. 143, slip op. at 2. The policy, *inter alia*, prohibited employees from sharing confidential materials with the general public, conveying, or displaying anything pornographic, profane abusive, or offensive, sending chain letters, soliciting for personal gain, violating company policies or rules, and visiting inappropriate websites. *Id.*

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<sup>21</sup> In *Purple Communications*, the Board overruled the holding of *Register Guard*, 351 NLRB 1110 (2007), *enfd.* in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) that, under ordinary circumstances, even employees who have been given access to their employer’s e-mail system have no right to use it for Sec.7 purposes. 361 NLRB at 1053–1054. Instead, the Board adopted an analytical framework using *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) as its starting point.

<sup>22</sup> For example, the Board noted, if a union posts material on an employer’s bulletin board, less space remains for the employer to post its messages. 361 NLRB at 1057. Similarly, if an employee uses an employer’s telephone line, that line is unavailable for use by others. *Id.*

<sup>23</sup> The Board, however, stated that an employer may rebut this presumption by showing that special circumstances necessary to maintain production or discipline justify restricting its employees’ rights. 361 NLRB at 1063. The employer would have to show that any such limitation is both no more restrictive than necessary to protect the employer’s interests and is connected to the interests asserted. *Id.*



The Board, in overruling *Purple Communications*, found that there is no statutory right for employees to use employer-provided e-mail for nonwork, Section 7 purposes in the *typical workplace*. (Emphasis added.) 368 NLRB No. 143, slip op. at 6. The Board further found that employer communication systems, including e-mail systems, are its property. *Id.*, citing *Register Guard*, 351 NLRB at 1114. Accordingly, the Board stated, employers have a property right to control the use of these systems. *Id.*, citing *Eaton Technologies*, 322 NLRB 848, 848 (1997) and *Nugent Service*, 207 NLRB 158, 161 (1973). The Board further noted that it has explicitly recognized that the Act does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time.<sup>24</sup> 368 NLRB No. 143, slip op. at 7. The Board stated that *Republic Aviation* stands for the twin propositions that employees must have access to adequate means of communication in order to meaningfully exercise their Section 7 rights and that employer property rights must yield to employees' Section 7 rights only when necessary to avoid creating an *unreasonable* impediment to the exercise of those rights. (Emphasis in original; internal quotation marks omitted.) 368 NLRB No. 143, slip op. at 9, citing *Republic Aviation*, 324 U.S. at 802 fn. 8. The Board also asserted that, in modern workplaces, employees have access to smartphones, personal e-mail accounts, and social media, which provide additional avenues of communication for Section 7 purposes. 368 NLRB No. 143, slip op. at 9. Therefore, the Board found no basis for concluding that a prohibition on the use of an employer's e-mail system for nonwork purposes in the typical workplace creates an unreasonable impediment to the exercise of employee Section 7 rights. *Id.*

The *Caesars Entertainment* majority, however, recognized that there may be cases in which an employer's e-mail system provides the only reasonable means for employees to communicate with one another. 368 NLRB No. 143, slip op. at 10. Thus, an employer's property rights may be required to yield in such circumstances to ensure that employees have adequate avenues of communication. *Id.* The Board expected such cases to be rare and did not attempt to define the scope of this exception. *Id.* Accordingly, the Board held that an employer does not violate the Act by restricting the non-business use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.<sup>25</sup> *Id.* The Board applied this standard retroactively. 368 NLRB No. 143, slip op. at 10–11.

Subsequently, in *Argos USA LLC, d/b/a Argos Ready Mix, LLC*, 369 NLRB No. 26 (2020), the Board examined an employer policy that its e-mail system was to be used for business purposes and not for personal purposes. Applying *Caesars Entertainment*, the Board found that this facially neutral restriction on employees' personal use of the employer's e-mail system was lawful. 369 NLRB No. 26, slip op. at 5. In discussing the exception contained in the *Caesars Entertainment* analysis, the Board found that the employer's facility was a "typical workplace," where employees are able to exercise traditional methods of Section 7 communication, including oral solicitation in the breakroom on nonwork time. *Id.* In finding that the employer's facility was a typical workplace, the Board further stated that there was, "no indication that the

<sup>24</sup> For example, the Board has found that an employer may promulgate and enforce rules prohibiting union solicitation during working hours. 368 NLRB No. 143, slip op. at 7, citing *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), *enfd.* 142 F.2d 1009 (5th Cir. 1944) and *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 620 (1962).

<sup>25</sup> The Board did not consider whether discriminatory enforcement of the employer's policy had been established in *Caesars Entertainment*.

employees did not have access to more modern forms of communication, such as use of personal e-mail and social media, that do not require using the [r]espondent's e-mail system." *Id.* Thus, the Board found the employer's restriction on its employees' use of its e-mail system for nonwork purposes permissible. *Id.*

5 Shortly thereafter, the Board again applied its *Caesars Entertainment* analysis to a situation in which an employee attempted to use her employer's e-mail system to send a union solicitation to 595 coworkers. In *T-Mobile USA, Inc.*, the employer responded to this attempt by instituting new rules and advising the employee that she could not send certain e-mails to other employees' work e-mail addresses.<sup>26</sup> 369 NLRB No. 90, slip op. at 1 (2020). Prior to this incident, the employer maintained an acceptable use policy for its e-mail system. 369 NLRB No. 50, slip op. at 3.<sup>27</sup>

15 In *T-Mobile USA*, the Board found that the employee had adequate and effective means of communication with coworkers, including oral solicitation during nonwork time and access to smartphones, social media, and personal e-mail accounts, without the use of the employer's e-mail system. *Id.* The Board found no indication in the record that the employees did not have access to other reasonable means of communication, and no party contended that the respondent's e-mail system furnished the only reasonable means for the employees to  
20 communicate with one another, and, therefore, found that the offending employee did not have a Section 7 right to use the e-mail system to send the union solicitation message to her coworkers. 369 NLRB No. 90, slip op. at 2, citing *Argos USA, LLC*, 369 NLRB No. 26, slip op. at 5. More specifically, the Board found that employer was entitled to announce its new workplace rules and to tell the employee that she could not send certain e-mails to other employee's work e-mail  
25 addresses, when the rules and statement were promulgated in response the employee's impermissible use of the respondent's e-mail system in light of its lawful restrictions. 369 NLRB No. 90, slip op. at 2.

30 The Board next applied its *Caesars Entertainment* analysis in *Cellco Partnership d/b/a Verizon Wireless*, 369 NLRB No. 130 (2020). In *Cellco Partnership*, the employer maintained policies prohibiting the use of company resources, including e-mail, at any time to solicit or distribute or to transmit offensive or harassing communications, chain letters, unauthorized mass distributions, and communication primarily directed to a group of employees inside the company on behalf of an outside organization. 369 NLRB No. 130 slip op at 1 fn. 2. The Board found  
35 that there was no indication in the record that the employer's employees did not have access to other reasonable means of communication and no party contended that the employer's IT systems furnished the only reasonable means for employees to effectively communicate with one another. 369 NLRB No. 130, slip op. at 2. Thus, the Board found the employer's policy lawful and dismissed the complaint.<sup>28</sup> *Id.*

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<sup>26</sup> *T-Mobile USA, Inc.*, 369 NLRB No. 90 (2020), was a supplemental decision to *T-Mobile USA, Inc.*, 369 NLRB No. 50 (2020). In its original decision, the Board severed and retained the allegation discussed herein for consideration in light of its decision in *Caesars Entertainment*.

<sup>27</sup> In this policy, the employer reserved the use of its devices and e-mail system for legitimate business purposes, including work-life balance, traffic and carpool arrangements, weather conditions, and charitable events in which the employer was involved.

<sup>28</sup> In a case involving the same rules, the Board conducted the same analysis and reached the same result in *Cellco Partnership d/b/a Verizon Wireless*, 369 NLRB No. 131 (2020).

In *Northstar Memorial Group, LLC, d/b/a A Skylawn Funeral Home, Crematory & Memorial Park*, 369 NLRB No. 145 (2020), the Board applied *Caesars Entertainment* to a situation of a different nature. In *Northstar Memorial Group*, the employer took action to prevent an employee from displaying a pro-union sign during a burial service. 369 NLRB No. 145, slip op. at 1. Citing *Caesars Entertainment*, the Board found the employer's actions lawful, stating that the impact of the employer's actions on Section 7 activity were relatively minimal, and stating that the Act does not require employers to afford employees the most convenient of effective means of conveying their message, especially when the means chosen encroach on the interests of others. 369 NLRB No. 145, slip op. at 5, citing 368 NLRB No. 143, slip op. at 4.

Thereafter, in *Verizon Wireless*, the Board severed and retained for consideration allegations that the employer violated the Act by maintaining rules that: (1) prohibited using its resources, including its e-mail system, to solicit or distribute at any time, and (2) prohibited employees from using company systems, including its e-mail system, to engage in activities that are unlawful, violate company policy, or result in embarrassment to the company. 369 NLRB No. 108, slip op. at 4 fn. 17 (2020). The second rule prohibited using the employer's e-mail system to send communications primarily directed to a group of employees inside the company on behalf of an outside organization. *Id.* The Board later found the maintenance of these rules was lawful because there was no indication in the record that the employer's employees did not have access to other reasonable means of communication and no party contended that the employer's IT systems furnished the only reasonable means for employees to effectively communicate with one another. *Verizon Wireless*, 370 NLRB No. 5, slip op. at 2 (2020).

In September 2020, the Board considered another case involving Purple Communications as the respondent. *Purple Communications*, 370 NLRB No. 26 (2020) (*Purple Communications III*). In that case, the Board considered whether the employer violated the Act when it maintained a policy that strictly prohibited employees from using its e-mail system in connection with certain activities. 370 NLRB No. 26, slip op. at 2. Such activities included engaging in activities on behalf of organizations or persons with no professional or business affiliation with the employer and distributing non-business materials. *Id.* The Board found the maintenance of the policy lawful because there was no indication in the record that the employer's employees did not have access to other reasonable means of communication, and no party contended that the employer's IT systems furnished the only reasonable means for employees to effectively communicate with one another. 370 NLRB No. 26, slip op. at 3, citing *Cellco Partnership*, 369 NLRB No. 130 (2020).

In October 2020, the Board considered yet another case involving Purple Communications. *Purple Communications*, 370 NLRB No. 33 (2020) (*Purple Communications IV*).<sup>29</sup> In this most

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<sup>29</sup> For completeness of the record, another case involving Purple Communications as the respondent can be found at 365 NLRB No. 50 (2017). In that case, the Board affirmed the decision of Administrative Law Judge Paul Bogas. Judge Bogas found that Respondent granted employees access to the company e-mail system and maintained a prohibition on nonbusiness use of the company e-mail system that was broad enough to encompass employees' use of the e-mail system for Sec. 7 activities during nonworking time. *Purple Communications II*, 365 NLRB No. 50, slip op. at 1 (2017). Judge Bogas, as affirmed by the Board, found that the respondent violated the Act by maintaining an overly broad electronic

recent case, the Board considered whether the limited exception contained in *Caesars Entertainment*, applied to the same policy at issue in *Purple Communications III*, 370 NLRB No. 26 (2020). 370 NLRB No. 33, slip op. at 2–3. In *Purple Communications IV*, the Board found that there was no indication in the record that the employer’s employees did not have access to other reasonable means of communication and no party contended that the employer’s IT systems furnished the only reasonable means for employees to effectively communicate with one another. 370 NLRB No. 33, slip op. at 2. Thus, the Board found that the Respondent did not violate the Act. *Id.*

### C. Application of *Caesars Entertainment*

This case is readily distinguishable from *Caesars Entertainment*. The workplace in this case is not a typical workplace. The Board itself defined a typical workplace as one in which, “oral solicitation and face-to-face literature distribution provide more than adequate avenues of communication.” (Internal quotation marks omitted.) *Caesars Entertainment*, 368 NLRB No. 143, slip op. at 9.

Young’s workplace is far from typical. Young does not have any coworkers stationed with him in St. Louis. All of his coworkers are scattered throughout the United States, working in different facilities in different time zones. At most, Young sees his MTSC coworkers once per year. During the time period at issue in this case, there is no evidence that Young saw any of his MTSC coworkers at all. There is no breakroom in which the MTSC employees can meet and discuss their working conditions. Such a situation does not lend itself to oral solicitation or face-to-face distribution. Young only communicated with his coworkers and managers through e-mail. Thus, Young’s workplace seems to fall well outside of the Board’s definition of a typical workplace.

Unlike in *Caesars Entertainment* and its progeny, the General Counsel in the instant case specifically maintains that, absent the use of Respondent’s e-mail system, NSTs would be denied a reasonable means of communication for Section 7 purposes. The General Counsel further asserts that the Facebook page referenced in the record does not provide an effective channel for communicating about Section 7 issues.

My review of the record found only seven specific mentions of employees using the telephone to communicate with each other or with management. In dealing with the service call from the South Jersey facility, Young communicated with the site via telephone. (Tr. 88). In dealing with a service log request, Young advised the acting duty officer to call him with assignments. (GC Exh. 13; Tr. 116.) In response, Henegar asked Young to reply to him with an e-mail or a call. (GC Exh. 13.) Henegar testified that he “occasionally” receives calls from the NSTs. (Tr. 197.) Henegar testified that NSTs answer calls and have employer-provided cell phones.<sup>30</sup> (Tr. 236, 239, 300.) Henegar further testified that he told Young by phone that he was not seeking to abridge his ability to consult with his union steward. (Tr. 279.) Watts testified

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communications policy that restricted employees’ use of the Respondent’s e-mail system for Sec. 7 purposes. *Id.*

<sup>30</sup> However, Henegar testified that the cell phones are provided so that NSTs can check their e-mails. (Tr. 239.)

that NSTs communicate with managers via e-mail, text, and telephone. (Tr. 327.) However, all of the communications between Young and his managers in this case were conducted via e-mail.<sup>31</sup>

5 The record in this case encompasses testimony regarding incidents from December 2016 through September 2017. Thus, the record specifically mentions NSTs making phone calls or being asked to make phone calls four times in 10 months, making telephone use a rarity among Respondent's employees. In contrast, the record is replete with evidence of e-mails between employees and between employees and management. Young testified, without contradiction,  
10 that he sometimes receives over one hundred e-mails per day. In the same 10-month period, this would equate to thousands of e-mails. Given the geographic diversity of Respondent's NSTs, and the speed with which they communicate, I find that Respondent's e-mail system is the only reasonable means of communication available to them for Sec. 7 purposes.<sup>32</sup>

15 Furthermore, although Young testified that he has used a Facebook page set up by MTSC employees to communicate, this does not change my conclusions in this case. (Tr. 184.) The record is not clear as to when the Facebook page was established. (Tr. 185). In addition, the Facebook group is run by NST Mike Tretick, who has been hostile to Young. (GC Exh. 27.) Tretick himself stated, in an e-mail, that not all of the NSTs are part of the Facebook page. He  
20 told Henegar that he formed the group to, get the extraneous emails off Respondent's system. *Id.* Addressing Young's e-mails, Tretick stated, "These emails [sic] strings between you and Roy that Roy broadcasts to the world are a topic of discussion in the group." Thus, Young's efforts to reach his coworkers with matters of group concern were successful. In fact, some even supported Young's position. Tretick then encouraged Henegar to take action against Young.  
25 Given Tretick's actions in advising Henegar of the existence of the Facebook group, his hostility to Young, and his encouraging of Henegar to take action against Young, it seems probable that Tretick may allow members of management to be part of the Facebook page. Thus, the Facebook group mentioned transiently in the record does not provide a reasonable forum for Respondent's NSTs to engage in protected, concerted or union activity.  
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35 This case is also distinguishable from the other cases, analyzed above, regarding the application of *Caesars Entertainment*. For example, the workplace in *Argos USA LLC*, allowed for traditional face-to-face contact between employees. 369 NLRB No. 26 slip op. at 5. The workplace in *T-Mobile USA*, as discussed in the administrative law judge's decision, allowed for face-to-face contact. See 369 NLRB No. 50 (2020). The judge further discussed union literature being distributed in employee workspaces and the existence of break area. *Id.* The judge's decision in *Verizon Wireless* mentioned the existence of break rooms and a cafeteria. See 369

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<sup>31</sup> Only four of these references are to actual communications with employees about telephone use: (1) Young communicating with the South Jersey facility; (2) Young asking the acting duty officer to call him with service assignments; (3) Henegar asking Young to reply with an e-mail or call, and; (4) Henegar talking to Young on the phone about his right to consult with a union steward. The other three references to telephone use are mere generalities.

<sup>32</sup> It seems ridiculous to imagine that Respondent would prefer that Young call each of his 100 coworkers and his union representatives on the telephone instead of copying them on an e-mail to engage in protected, concerted activity. Even if each call lasted an average of only thirty seconds, it would take almost an hour for Young to contact all of his coworkers in this manner. If each call lasted one minute, Young would spend over an hour-and-a-half attempting to engage his coworkers.

NLRB No. 108, slip op. at 14. The existence of employee breakrooms was also mentioned in the judge's decision in *Purple Communications III*. See 370 NLRB No. 26, slip op. at 2. Thus, these cases involve traditional or typical workplaces. The workplace in this case is not typical. There are no physical spaces in which NSTs can meet and discuss issues affecting their

5 workplace. There are no bulletin boards on which employees can post items for information. Instead, virtually all employee interaction and discussion is conducted using Respondent's e-mail system. Thus, this case is readily distinguishable from the Board's other cases applying *Caesar's Entertainment*.

10 The case of *Northstar Memorial Group, LLC*, is also distinguishable from the instant case. Unlike all of the other cases in which the Board as applied its *Caesars Entertainment* standard, *Northstar Memorial Group* does not implicate the use of an employer's IT resources. See 369 NLRB No 145 (2020). Instead, the case involved an employee's attempt to post a pro-union sign at a burial service. *Id.* In dicta, the Board cited *Caesars Entertainment* for the proposition that

15 an employer need not afford its employees the most convenient or effective means of conveying their message, especially when the means chosen encroach on the interests of others. 369 NLRB No. 145, slip op. at 5. In this case, however, Respondent's e-mail system was the almost exclusive method for its employees to communicate with each other and with management. No third-party rights were implicated. As such, this case is distinguishable from *Northstar*

20 *Memorial Group*.

What is more, I find that the record contains ample evidence that Respondent applied its policies on the use of its e-mail systems in a discriminatory manner. Respondent permitted the use of its e-mail system for an abundance of nonwork purposes. For example, Respondent

25 looked the other way when its employees forwarded jokes and humorous photographs. However, Respondent singled out Young for his use of the e-mail system. As pointed out by the General Counsel in his brief on remand, there is no record evidence that any other MTSC employee was ever disciplined for his or her use of Respondent's e-mail system, no evidence in the record that Young's forwarding of his e-mails to the MTSC distribution list interfered with

30 Respondent's limited use allowance, and no evidence in the record that Young's forwarding of his e-mails to the entire MTSC distribution list interfered with Young's work or the work of the other NSTs.

In addition, Respondent's reaction to employees replying to the entire MTSC distribution list

35 about REAL ID stands in stark contrast to Respondent's reactions to Young's messages. Over the course of over almost a week in March, NSTs fired off e-mails to the entire network regarding the REAL ID issue. One employee directly mentions another, stating, "Really? . . . I'm not trying to bust your chops on this...I'm as irritated as you are except my source of irritation is the increasing intrusiveness of government . . ." Several other responses were also

40 sent to the entire MTSC distribution list before the conversation was abruptly shut down by Fauchier. However, none of the employees involved in this e-mail exchange were ever disciplined. For his actions in copying the entire network and his union representatives, Young received a notice of suspension. In addition, Young's e-mails were deemed the equivalent of shouting on the workroom floor and characterized as divisive and derisive. However, the

45 multiple employee statements questioning the MTSC's policy on not providing REAL ID compliant identification to its employees was not characterized in the same way. The key

difference between Respondent's different reactions was that Young's e-mails involved the union and the other employee e-mails did not.

Moreover, Henegar testified that nonwork use of Respondent's e-mail system is a common problem, however, the evidence adduced at trial established that Respondent only disciplined Young for this issue. The network-wide discussion of the REAL ID issue took place after Henegar's January admonition not to copy the entire network on e-mails. In fact, no fewer than five lengthy nonwork e-mail exchanges took place after Henegar's admonition. Nevertheless, only Young was disciplined for copying e-mails to the entire network. Clearly, Young was singled out for his protected, concerted, and union activity.

Henegar's true motivation for Young's discipline is also belied by what was written in Young's notice of suspension and what was discussed in his PDI. Young not only copied the MTSC distribution list in his e-mails, he also copied several union officials. Henegar testified that Young's copying of the union officials was not a problem. (Tr. 279.) However, Young's disciplinary report stated, "Despite this instruction, you e-mailed the entire network (MTSC-DL-National Support Technicians) *as well as several union officials*, despite previous instruction to cease this behavior during productive working hours." (Emphasis added.) (GC Exh. 14.) The disciplinary form goes on to mention Young's copying another e-mail response to "several union officials." (GC Exh. 14.) Furthermore, in the PDI immediately preceding the issuance of the notice of 14-day suspension, Henegar specifically asked Young about forwarding this e-mail to the "entire network and including several non-MTSC employees," which he deemed inappropriate. (GC Exh. 16.) The forwarding of the e-mails to "union officials" was also raised three times during the PDI.

It is further worth mentioning Respondent's limited use policy, which allows for the use of the government e-mail system so long as it is not inappropriate and does not interfere with productivity. Yet, Henegar did not mention any violation of this policy in Young's discipline. Henegar even testified that he did not consider the policy when deciding to discipline Young. Despite Respondent attempting to make much of whether Young was working or not when he sent the e-mails (and whether the recipients of the e-mails were working at the time that they received them), this is of no importance as Respondent, by its own admission, did not consider the limited use policy when deciding to discipline Young. Instead, Henegar disciplined Young for failing to follow his unlawful instruction not to include the entire MTSC distribution network in his responses to e-mails. As I found in my initial decision, Young and the other NSTs were engaged in protected, concerted and/or union activity when they forwarded their e-mails to the entire network. Respondent's decision not to allow Young to communicate with his fellow employees regarding terms and conditions of employment, while allowing other employees to use Respondent's e-mail for any purpose with impunity, demonstrates that Respondent discriminatorily applied its policies to Young.

Therefore, Respondent not only objected to Young engaging in protected, concerted activity by alerting his fellow NSTs to possible changes in Respondent's policies and procedures, but also to Young engaging in union activity by forwarding the e-mails to his union representatives. Any testimony in contradiction to these clear and documented incidents of discrimination is not credited.

*D. Young and his Coworkers Engaged in Protected, Concerted Activity and/or Union Activity*

In his remand brief, counsel for Respondent asserts that Young was not engaged in protected, concerted activity when he sent his e-mails to the entire MTSC network. However, in his brief following the hearing in the case, Respondent stipulated that all but two of Young's e-mails constituted protected, concerted activity. I found in my underlying decision that Young and his fellow employees were engaged in protected, concerted, and/or union activities in copying their e-mails to the MTSC distribution list. I stand by these findings.<sup>33</sup>

Vacation and leave time constitute terms and conditions of employment. *Mesker Door, Inc.*, 357 NLRB 591, 606 (2011). Restricting the discussion of these terms of employment interferes with the exercise of Section 7 rights just as much as a rule forbidding employees from talking about wages. *Id.* Thus, I find that Young's forwarding of his e-mails concerning Respondent's denial of his leave request on January 9 and 10 to his coworkers and union officials constituted protected, concerted and union activity.

Clearly, performance expectations of employees are terms and conditions of employment. In his e-mail message of February 8, Henegar questioned Young's approach to a work assignment in requesting onsite assistance after a short period of time. In his e-mail message of February 10, Watts questioned Young's approach to a work assignment in elevating a call to a SME after a short period of time. Young copied his responses to both managers to the MTSC distribution list and union officials in order to seek assistance and advice from other NSTs. The Board has found that complaining to other employees about job performance standards and how they are being applied has been found to constitute protected, concerted activity. *Bozzuto's Inc.*, 365 NLRB No. 146, slip op. at 3–4 (2017). Thus, Young's forwarding of his February 8 and 10 e-mail to his coworkers and union officials constituted protected, concerted and union activity.<sup>34</sup>

Furthermore, job requirements (i.e. the requirement to have required identification for work-related travel) are also terms and conditions of employment. Employees responding to the entire

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<sup>33</sup> Respondent seeks the overturning of the Board's decision in *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014), a case relied upon in my decision. It is well settled that administrative law judges of the National Labor Relations Board are bound to follow Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals or district courts. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004).

<sup>34</sup> Respondent's attempt to cast Young's actions as matters of individual concern or mere griping are unavailing. The Board has recognized that the reach of Sec. 7 activity includes initial steps by one employee to solicit the help of fellow employees on group concerns and to bring those concerns to the attention of management. See *Marburn Academy*, 368 NLRB No. 38, slip op. at 10 (2019). Respondent's application of its leave policy, performance standards, and requirements for REAL ID compliance are equally applicable to all NSTs, and Young's and others' sharing information relevant to those topics with the group constituted protected, concerted activity undertaken for mutual aid and protection. See *Fresh & Easy Neighborhood Market, Inc.*, ("Where an employee's objective in taking certain action may be mixed, and one supports a finding of concertedness, [the Board] may not ignore it in favor of one that does not.") 361 NLRB 151, 154 fn.11, citing *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993).



network to discuss who would bear the cost of such required identification was a matter of concern to all NSTs. Therefore, I find that the employees' e-mailing each other concerning the REAL ID issue in March amounted to protected, concerted activity.

5 Finally, a change in employer policy regarding employee work requirements is a matter of concern to all NSTs. In March, Henegar again advised Young to limit his e-mail responses to management. Nevertheless, Young replied to Henegar's e-mail by copying the entire MTSC distribution list and union officials, so that everyone would know that Henegar was seeking to vary from the policy contained in Respondent's SOP that NSTs should check their e-mails twice  
10 a day. Thus, I find that Young's copying of his response to Henegar to the MTSC distribution list and union officials on March 15 constituted protected, concerted activity.

*E. Respondent Violated the Act as Alleged*

15 Following my complete review of the record and the Board's jurisprudence contained in *Caesars Entertainment* and its progeny, I again find that Respondent violated the Act as alleged in the General Counsel's complaint, as amended at the hearing.

Respondent maintained a policy that specifically allowed for personal use of its e-mail  
20 system. (GC Exh. 4.) This policy allowed for the brief sending of e-mail messages that did not interfere with employee productivity. There has been no showing that Young's forwarding of his e-mails to the MTSC distribution list and union officials diminished his productivity or that of his peers. Furthermore, there is ample evidence that Respondent tolerated personal use of its e-mail for the sending of jokes, photos, and other matters. Even with the existence of this policy,  
25 Respondent admitted that the policy played no role in its decision to discipline Young.<sup>35</sup>

Respondent attempts to differentiate Young's e-mails from those of his coworkers were unavailing. I did not and still do not accept this differentiation. Watts did not consider e-mails containing jokes, weather reports, a photo from the movie *Jaws*, and a photo of a ship being  
30 overtaken by a kraken inappropriate. (GC Exh. 18.) Watts testified that he approved of an e-mail exchange containing jokes about beer and chainsaws because it contained a photograph of an employee about to cut up a downed tree. (GC Exh. 20; Tr. 345). He and Henegar were not concerned about an e-mail from the "Irma Road Crew" containing photographs of steaks and beer. (GC Exh. 22). As I have previously found, Watts' testimony that these e-mails were  
35 acceptable because he was concerned for the well-being of employees defied credulity and I did not afford it any weight.

The only difference between the humorous e-mails and Young's e-mails is that Young's e-mails constituted protected, concerted and union activity and the other e-mails did not. I find  
40 that Respondent's characterizing of Young's e-mails as "derisive," "divisive," and "the equivalent of screaming on the work room floor," were merely veiled references to Young's

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<sup>35</sup> Even if Young stopped working to protest his working conditions, his actions were still protected. There is no evidence that Young's drafting and forwarding of his brief e-mail messages interfered with his productivity. The Board has held that on-the-job work stoppages of significantly longer duration remained protected. *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1100 (2011), citing *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 202, 202 fn. 8, and 11 (2009), adopted by 355 NLRB 602 (2010) (no loss of protection for 2-hour work stoppage that did not interfere with the hotel's operations).

protected, concerted and union activity. Respondent did not consider employees' use of its e-mail system to argue about whether it should pay for REAL ID to be problematic. Again, the difference here is the involvement of Young and the union in Respondent's objections to Young's e-mails.

As stated above, Young's e-mails of January 9 and 10 constituted protected, concerted activity. On January 9, Henegar advised Young, "Any response to this e-mail should be restricted to Dan and me." (GC Exh. 10.) On January 10, Henegar advised Young

First, I have asked you to restrict your e-mail to Dan and me. Specifically, you are afforded grievance rights under Article 15 of the National Agreement should you disagree with the directive. You are not empowered with the right to the equivalent of screaming on the work room floor. Please ensure that you are using the appropriate channels.

(GC Exh. 10.)

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." It is axiomatic that Section 7 protects employees' right to discuss, debate, and communicate with each other regarding workplace terms and conditions of employment.

As a general proposition, an employer violates Section 8(a)(1) when it forbids employees to discuss working conditions or union matters with other employees, when it does not prohibit the discussion of nonwork-related matters while on duty. *Amalgamated Transit Union, Local 689*, 363 NLRB No. 43 (2015). There is no evidence that Respondent ever prohibited the discussion of nonwork-related matters among its employees. In fact, Watts and Henegar found other employees' transmission of jokes and humorous photographs to be acceptable uses of Respondent's e-mail system. Henegar's and Watts' statements to Young not to communicate with other employees about perceived harassment and employee performance standards, violated the Act.

Similarly, I found that discussing a requirement that employees possess REAL ID compliant identification for work-required travel constituted a discussion of terms and conditions of employment and protected, concerted activity. Thus, Fauchier's admonition to employees to stop discussing REAL ID and to direct all comments and concerns to him, constituted a violation of Section 8(a)(1) of the Act.

It is well recognized that an employer violates Section 8(a)(1) of the Act by threatening an employee with reprisals for discussing working conditions with other employees and by telling employees to talk to employer representatives about working conditions rather than other employees. Further, employees must not be required to obtain prior authorization from the employer in order to engage in protected activity. See *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 4 (2016), citing *Brunswick Corp.*, 282 NLRB 794, 795 (1987). Also, see *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 4–5 (2016). Here, on numerous occasions, Respondent's managers advised Young to limit his communications to management. Therefore, I find that Respondent violated the Act as alleged on January 9 and 10, February 8

and 10, and on March 15, when it advised Young to limit his responses to management. I further find that Respondent violated the Act on March 13 when Fauchier advised the NSTs to cease their discussion of a term and condition of employment and to limit any further responses to management.

5 The General Counsel further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by issuing Young a notice of 14-day suspension. (GC Exh. 1(c).) In its answer, Respondent denied that it violated the Act. (GC Exh. 1(f).) The motivation for the issuance of Young's notice of suspension is not in dispute. Young received the notice of suspension for failing to follow the instructions of Henegar and Watts not to copy the MTSC distribution list on his e-mail responses on February 8 and 10. I have already found that Young was engaged in protected, concerted, and union activity when he did so. As such, Young was disciplined for engaging in protected, concerted activity. Where protected concerted activity is the basis for an employee's discipline, the normal *Wright Line*<sup>36</sup> analysis is not required. *Chromalloy Gas Turbine Corp.*, 15 331 NLRB 858, 864 (2000), enfd. 262 F.3d 184 (2d Cir. 2001). See also *Allied Aviation Fueling of Dallas, LP*, 347 NLRB 248, 254 fn. 2 (2006), enfd. 490 F.3d 374 (5th Cir. 2007) ("The Board has consistently held that, where an employer admits that it discharged an employee for engaging in protected activity, a *Wright Line* analysis is inapplicable.") Respondent's stated reason for Young's discipline was his failure to follow the orders of Henegar and Young not to forward e-mails to his coworkers and to limit his communications to management only. As Young was 20 disciplined for engaging in protected, concerted activity, I find that Respondent violated Section 8(a)(3) and (1) of the Act in issuing him the notice of suspension.

25 However, even under the burden shifting framework of *Wright Line*, I would find that Respondent's discipline of Young violated the Act. In determining whether adverse employment actions are attributable to unlawful discrimination, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel has the initial burden of establishing, by a preponderance of the evidence, that the employee's protected activity was a motivating factor in the decision to issue discipline or to discharge the employee. *Volvo Group North America, LLC*, 30 370 NLRB No. 52, slip op. at 2 (2020). The Board has most often summarized the elements commonly required to support the General Counsel's initial burden as (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer. *Id.* But the General 35 Counsel does not invariably sustain his burden by producing any evidence of animus or hostility toward union or other protected concerted activity. Rather, the evidence must be sufficient to establish a causal relationship between the employee's protected activity and the employer's adverse action against the employee. *Id.*, citing *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6–8 (2019).

40 Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428–1429 (11th Cir. 1985). Direct evidence of unlawful motivation is seldom available, and, therefore, the General Counsel may rely upon

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<sup>36</sup> 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983).

circumstantial evidence to meet the burden. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Circumstantial evidence is used frequently to establish knowledge and animus because an employer is unlikely to acknowledge improper motives in discipline and termination. *NLRB v. Health Care Logistics*, 784 F.2d 232, 236 (6th Cir. 1986), enfg. in part 273 NLRB 822 (1984); see also *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001) (“The Board has long recognized that direct evidence of an unlawful motive, i.e., the proverbial smoking gun, is seldom obtainable. Hence, an unlawful motive may be inferred from all of the surrounding circumstances.”).

If the General Counsel makes the initial showing, the burden shifts to the Respondent to establish that it would have disciplined or discharged the employee for a legitimate, nondiscriminatory reason. *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 3 (2019). An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996), and *T&J Trucking Co.*, 316 NLRB 771 (1995).

The General Counsel has established that Young’s protected, concerted and union activity were a motivating factor in his discipline. Respondent’s managers advised Young on numerous occasions to stop disseminating e-mails to the MTSC distribution list and union officials and it was his failure to follow these instructions that resulted in his discipline. I have found that Young was engaged in protected, concerted and union activity when he forwarded his e-mails. Respondent clearly had knowledge of his activity, as the messages were received by both Henegar and Watts. Respondent bore animus to this activity, as it mentioned Young’s repeated failures to follow instructions and its admonitions to his to stop forwarding e-mails to the MTSC distribution list. Respondent has made no effort to prove it would have taken the same action against Young absent his protected conduct. As such, I would find that the General Counsel would have proved a violation of Section 8(a)(3) and (1) under the burden shifting framework of *Wright Line*.

### CONCLUSIONS OF LAW REGARDING REMANDED ALLEGATIONS

1. The Board has jurisdiction over the Respondent by virtue of Section 1209 of the Postal Reorganization Act (PRA).
2. American Postal Workers Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act on multiple occasions when it directed employees to limit their e-mail communications to supervisors and managers only, and not to copy or forward e-mails to other employees, or their union representatives, when such e-mails constituted protected, concerted and/or union activity.
4. Respondent violated Section 8(a)(3) and (1) of the Act by issuing a notice of 14-day suspension to Roy Young.
5. The unfair labor practices committed by Respondent affect commerce within the meaning

of Section 2(6) and 2(7) of the Act.

### REMEDY

5 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I recommend Respondent be ordered to remove from its files any reference to Young's unlawful notice of suspension and to notify him in writing that this has been done and that the unlawful notice of suspension will not be used against him in any way.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>37</sup>

### ORDER

15 The Respondent, United States Postal Service, St. Louis, Missouri, and Norman, Oklahoma, its officers, agents, successors, and assigns, shall

20 1. Cease and desist from

(a) Instructing employees to limit e-mail communications to supervisors and managers only, and not to copy or forward e-mails to other employees, or to union representatives, when such e-mails contain communications about terms and conditions of employment and constitute union and/or protected, concerted activity.

25 (b) Issuing notices of suspension to or otherwise discriminating against employees because they engage in union or protected, concerted activity.

30 (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

35 (a) Rescind the notice of 14-day suspension issued to Roy Young on March 14, 2017.

(b) Remove from its files any reference to the unlawful issuance of notice of suspension of Roy Young and notify him in writing that this has been done and that the notice of suspension will not be used against him in any way.

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<sup>37</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix."<sup>38</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically to Respondent's National Support Technicians employed at any of its facilities, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means.<sup>39</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 18, 2021



Melissa M. Olivero  
Administrative Law Judge

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<sup>38</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>39</sup> I have ordered electric distribution of the Notices due to the geographic isolation of Respondent's National Support Technicians, all of whom were made aware of Respondent's instructions to limit responses to e-mails to its supervisors and managers and not to copy other employees on e-mails.

## APPENDIX

## NOTICE TO EMPLOYEES

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** instruct you to limit your email communications to supervisors and managers only, and not to copy or forward emails to other employees, or to your union representatives, when such emails contain communication with us about terms and conditions of employment and constitute union and/or protected, concerted activity.

**WE WILL NOT** suspend or otherwise discriminate against you because you engage in union or protected, concerted activity.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

**WE WILL** rescind the notice of 14-day suspension issued to Roy Young on March 14, 2017, and **WE WILL** remove from our files any reference to the notice of 14-day suspension issued to Roy Young and notify him in writing that this has been done, and that the notice of suspension will not be used against him in any way.

**UNITED STATES POSTAL SERVICE**

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829  
(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at <http://www.nlr.gov/case/14-CA-195011> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7780.